Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1994

BRETT MUSCATELL
and LEWIS BOWER

Joint Petitioners,

vs.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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4 COPIES

QUESTIONS PRESENTED

I. Whether the Eleventh Circuit Court of Appeals erroneously found that the challenged evidence of other crimes, wrongs or acts were extrinsic in nature or intrinsic in nature and, therefore, subject to Federal Rule of Evidence 404(b).

II. Whether the balancing test for Federal Rule of Evidence 404(b) is identical, or more or less stringent than the balancing test set out in Federal Rule of Evidence 403.

III. Whether the probative value of the extrinsic offense evidence in Petitioners case was outweighed by it's prejudicial effect.

IV. Whether the Court failed to consider and analyze the cumulative prejudicial effect of the issues contained in the appellants brief.

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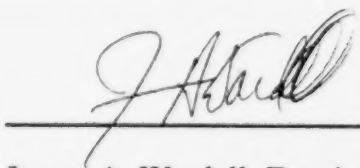
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by United States Mail _____ this day of May, 1995 to the Office of the United States Attorney, 500 Zack Street, Suite 400, Tampa, FL 33602 and the Office of the Solicitor General, Department of Justice, Washington, D.C. 20530.



James A. Wardell, Esquire

No. _____

IN THE

Supreme Court of the United States

October Term, 1994

BRETT MUSCATELL
and LEWIS BOWER

Joint Petitioners,

vs.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, Brett Muscatell and Lewis Bower, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above referenced matter on January 15, 1995.

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals is Reported at 42 F.3d 627 (llth Cir. 1995). The Eleventh Circuit affirmed the conviction and sentence of the Defendants and issued a published opinion. Their writing is reproduced in the Appendix hereto. (App. A) The Eleventh Circuit Denied a Petition for Rehearing.

JURISDICTION

This joint Petition seeks review of the Judgment of the Eleventh

Circuit Court of Appeals entered on January 18, 1995. (App. A). This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1). This Petition presents to this Court a case wherein the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Additionally, a conflict exists between cases decided by the Eleventh Circuit which materially effects a determination made in the present case. The conflict is whether the standard for reviewing the admissibility under Federal Rule of Evidence 404(b) as set out in *United States v. Beechum*, 582 F.2d 898 (5th Cir.) (en banc), *cert. denied,* 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed. 2d 472 (1979) is identical, or more or less stringent than the standard set out in Federal Rule of Evidence 403, for the balancing of unfair prejudice versus probative value.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

1. Fed. Rules of Evid.Rule 404(b), 28 U.S.C.A.
2. Fed. Rules of Evid.Rule 403, 28 U.S.C.A.
3. 21 U.S.C. § 846. Attempt and Conspiracy.
4. 18 U.S.C. § 371. Conspiracy.
5. 18 U.S.C. § 1343. Wire Fraud.
6. 18 U.S.C. § 1344. Bank Fraud.
7. 18 U.S.C. § 1001. False and Fraudulent statements in matters within jurisdiction of federal agency.
8. 18 U.S.C. § 1957. Money-laundering.

STATEMENT OF THE CASE

(i) *Course of Proceedings and Disposition Below*

On August 12, 1992, an Eleven Count Indictment, returned by the Grand Jury, was filed with the Clerk of the United States District Courtare as follows:for the Middle District of Florida. (R. 1-1). A summary of the charges contained in the Indictment against Mr.

Muscatell and Mr. Bower are as follows:

COUNT ONE: Beginning in or about August, 1988, and continuing through in or about September, 1989, the defendants conspired to knowingly and willfully commit Bank Fraud, make false statements in matters within the jurisdiction of the FSLIC, the FHLBB and the FDIC, and commit wire fraud.

COUNT TWO: Beginning in or about July, 1988, through in or about September, 1989, the defendants knowingly and willfully committed wire fraud.

COUNT THREE: On or about November 28, 1988 the defendants executed a scheme to defraud MidState Federal of $122,598.21.

COUNT FOUR: On or about December 20, 1988, the defendants executed a scheme to defraud Security First of $122,449.08.

COUNT FIVE: On or about July 26, 1989, the defendants executed a scheme to defraud Centrust Bank of $111,532.75.

COUNT SIX: On or about September 22, 1988, the defendants made false and fictitious statements to Market Street Mortgage Corporation.

COUNT SEVEN: On or about September 22, 1988, the defendants made false and fictitious statements to American Home Funding.

COUNT EIGHT: On or about May 22, 1989, the defendants made false and fictitious statements to American Home Funding.

COUNT NINE: On or about June 5, 1989, the defendants made false statements to Empire Credit Corporation.

COUNT TEN: On or about June 28, 1989, the defendants engaged in a monetary transaction, affecting interstate commerce, in criminally derived property in that the defendants deposited $48,227.70 into Palladino Account number 400874098 at First Florida Bank.

COUNT ELEVEN: On or about July 28, 1989, the defendants engaged in a monetary transaction, affecting interstate commerce, in criminally derived property in that the defendants deposited $50,161.95 into Palladino Account number 400874098 at First Florida Bank.

FORFEITURES: The defendants should forfeit $98,389.65 in U.S. currency based on their activity alleged in Counts Ten and Eleven.

The Defendants were arraigned on August 26, 1992 and released on bond pending trial. (R. 1-16)[1]. The Defendants filed various pretrial motions, including a Motion for Order Requiring the Government to Provide Notice of Intent to Offer Evidence Under Rule 404(b), Federal Rules of Evidence, (R. 1-27) and a Motion for Disclosure of Government Intent to Rely on Collateral Acts (R. 131). These Motions were Granted by the Court to the extent that the Government was required, within thirty (30) days from the date of the Order, to specify any acts it intends to introduce in its case-in-chief under Rule 404(b), Fed. R. Evid. The Order of U.S. Magistrate Judge Charles Wilson was dated October 14, 1992. (R. 1-103).

Jury trial for Mr. Muscatell and Mr. Bower began on April 6, 1993, before the Honorable Samuel P. King. (R. 1-1). The Defendants were presented, via fax, with the Government's Notice of Intent To Introduce Evidence on April 5, 1993. (R. 2-115). The Defendants objected to the Government's late notice as well as to the introduction of the evidence itself. (R. 3-3). The Judge deferred ruling on the admissibility of the evidence until April 14, 1993, when he heard argument and ruled in favor of allowing the evidence to be admitted over the defense objections. (R. 7-31). After the Government rested its case, the Defendants moved for a judgment of acquittal as to all counts. (R. 10-143-150). The Court denied the Motion and Mr. Muscatell began to present his case. Mr. Muscatell's case consisted of his testimony as well as the testimony of three character witnesses, Craig M. Richie, Ernestina Gaona and Guy

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1. All record cites are to record on appeal.

Domm. After this testimony, Mr. Muscatell rested. Mr. Bower did not testify and did not present witnesses and rested his case. The Defendants renewed their Motion for judgment of Acquittal under Rule 29. (R. 11-148, 149).

On April 21, 1993, Judge King instructed the jury and sent them to the jury room for deliberations. The jury deliberated for four (4) days until April 26 when a verdict of guilty against Mr. Muscatell was returned on all counts except for count Nine in which Mr. Muscatell was found not guilty and counts Six and Nine in which Mr. Bower was found not guilty. The jury then was instructed on the forfeiture counts. (R. 14-55). They returned a Special Verdict For Forfeiture and determined the extent of interest in the property to be forfeited regarding Mr. Bower to be zero in count Ten and count Eleven and, as to Mr. Muscatell, $38,375.00 (R14-62).

On September 27, 1993, Judge King sentenced Mr. Muscatell to serve thirty-six (36) months imprisonment (R. 15-97) and sentenced Mr. Bower to twenty-four (24) months imprisonment and ordered both Defendants to pay $680,827 in restitution and for Mr. Muscatell to pay a $500.00 special assessment. Defendant Muscatell timely filed his Notice of Appeal on September 27, 1993 and Mr. Bower timely filed his Notice of Appeal on October 1, 1993. (R. 2-171). Both Defendants, Muscatell and Bower, were granted an Appeal Bond by the Honorable Samuel P. King. Judge King certified that substantial issues on appeal existed and that the Defendants were not a risk of flight or a danger to the community. He allowed them to remain released on the same terms and conditions of their original bond.

On January 18, 1995, the Eleventh Circuit Court of Appeals delivered an opinion of AFFIRMED as to the Appeal of both Mr. Muscatell and Mr. Bower. (App. A). Both Muscatell and Bower filed separate Petitions for Rehearing by the Eleventh Circuit. On February 7, 1995, the Court denied the Defendant's Petitions for Rehearing. Each Defendant then Moved for a Stay of the Issuance of the Mandate pending Petition to the United States Supreme Court for a Writ of Certiorari. This Stay was granted until May 19, 1995 (App. B) by which time the Defendant/Appellant's were required to

file their Petitions. In the interest of judicial economy and based on the similarities and overlapping of issues, Muscatell and Bower are filing a joint Petition for Writ of Certiorari.

The Petitioner's are requesting that the Supreme Court continue the stay of the issuance of the mandate until such a time as the final determination of this Petition.

(ii) *Statement of the Facts*

The Petitioner Brett Muscatell was employed by ReMax Realty Group in 1988 and was involved in selling real estate in the Tampa Bay area. (R. 1110,11). Mr. Muscatell received a Hall of Fame Award from ReMax in 1989 for his achievements in 1988. (R. 11-11). ReMax is a large international real estate organization. (R. 11-11).

Mr. Muscatell perceived that certain real estate opportunities existed as a result of the tax law change. (R. 11-11). Mr. Muscatell relied upon the advice of the Florida Real Estate Commission, an opinion issued by the Assistant Attorney General and subsequent articles in trade publications, his own personal attorneys and discussions with the ReMax branch manager as to the legality of real estate techniques he utilized during these transactions. (R. 11-11,12). Mr. Muscatell saw the business opportunity as a win-win situation for everybody involved. (R. 11-11). The sellers were anxious to rid themselves of properties that required hands on management, but no longer provided tax benefits as before. (R. 11-13). The buyer could acquire a good investment, if managed and maintained properly Mr. Muscatell and his parents could benefit financially from commissions and second mortgages. (R. 11-12,13,15).

In 1988, Mr. Muscatell was approached by John Rico regarding the purchase of investment property. Rico had experience in the maintenance aspect of investment real estate and he told Mr. Muscatell that he had good credit and wanted to purchase real estate and make some money. (R. 4177).

After being shown four (4) quadraplex apartments in buildings on North 15th Street, Mr. Rico agreed to purchase the properties.

(R. 4-178,179).

Mr. Rico testified that he received a letter from Mr. Muscatell stating that Mr. Muscatell was returning a portion of his commission to Mr. Rico. (R. 4-180).

The property was to be purchased by Mr. Rico from Palladino Corporation which purchased the property from the original owners. (R. 4-181,182). Palladino Corporation was a Florida Corporation in which Mr. Muscatell and Mr. Bower, his family's C.P.A., held title to property through the corporation as trustee for Mr. Muscatell's parents. (R. 11, 62, 63).

Mr. Rico used Keith Slater as a mortgage broker to prepare documentation and present the loan package to lenders to obtain financing for purchase of these properties. (R. 4-179). Mr. Rico testified that he was instructed by Mr. Muscatell as how to create false documents and to supply false information to the lenders in order to secure financing. (R. 4-191-192).

Mr. Rico testified that he intended to operate, maintain and rent the units himself in order to cut costs, and to eventually sell them and make a profit. (R. 4-200, 228).

After closing on the 15th Street properties, Mr. Rico found additional properties on 50th Street. Mr. Rico approached Mr. Muscatell about buying these properties. (R. 4-201, 202). Mr. Rico expressed his concern to Mr. Muscatell about qualifying for the loan on the 50th Street properties. Mr. Muscatell informed him that qualifying was not Mr. Muscatell's problem, it was Mr. Slater's problem to get Mr. Rico qualified. (R. 4-204).

A secretary to Mr. Muscatell, Rosalyn Haddle, signed re-negotiated leases to the property being purchased by Mr. Rico as an assistant manger of these properties, even though she never inspected or managed these properties. (R. 8-7). Further, Ms. Haddle testified that she placed the name of a girl she went to high school with on a lease that was needed to secure financing at the direction of Mr. Muscatell. (R. 7-274).

Mr. Slater testified that he was instructed and directed by Mr. Muscatell as to how to falsely qualify Mr. Rico for these loans.

Mr. Rico and Mr. Slater testified under plea agreements with the Government that called for lenient treatment in cooperation for their testimony.

Mr. Rico was able to make mortgage payments for about one year before a criminal element moved into the neighborhood, causing good tenants to move out. When the rents stopped coming in, the properties were eventually foreclosed upon. (R. 4-232, 233).

The Government also called the sellers of this property, the appraisers, the title agents, the bank representatives and various other witnesses.

Over the Appellant's objection, testimony was elicited by the Government from Allen Steinberg, a property appraiser, about conversations he had with Mr. Muscatell and Mr. Slater after the completion of the appraisals regarding the properties contained in the Indictment. (R. 8-90). Mr. Steinberg testified that he was requested by Mr. Slater to perform appraisals on another set of properties located on Mascotte Street. (R. 8-90). These properties were not listed in the Indictment, but were listed on the Government's Notice of Intent to Introduce Evidence. Mr. Steinberg refused to do these additional appraisals because in his opinion the Mascotte Street properties did not support the value that Mr. Slater was requesting. (R. 8-91).

After his refusal to do the appraisal, Mr. Slater scheduled a meeting between himself, Mr. Steinberg and Mr. Muscatell at a Wag's Restaurant in the Town and Country area of Tampa, Florida. (R. 8-93). At this meeting Mr. Muscatell explained to Mr. Steinberg how the properties were sold and why the prices were so high and asked Mr. Steinberg to perform the appraisals. (R. 8-95). When Mr. Steinberg refused to do the appraisals, he testified that Mr. Muscatell offered Mr. Steinberg some portion of a note as a type of bribe to get him to do the appraisals on the Mascotte Street properties. On rebuttal closing argument, the Government's prosecutor referred to this

event as "...the bribe offer — there's no other way to describe it — $10,000.00. Steinberg was clear. It was half of a $20,000.00 note that Mr. Muscatell offered him at that meeting in Wag's." (R. 12-157).

Keith Slater was permitted, over objection, to testify to a conversation with Mr. Muscatell which occurred before the time set out in the Indictment and involved real property that was being purchased by Mr. Slater. This property transaction was not one of the eight (8) transactions specified in the Indictment. Mr. Slater explained that in 1987 Mr. Muscatell explained to him that it was legal for Mr. Muscatell to file a rebate to a buyer on a real estate commission. Mr. Slater testified that Mr. Muscatell told him that the lender should not know about the rebate or it would be treated as a reduction in sales practice. (R. 8-234). Mr. Slater also provided testimony that generally dealt with property transactions which occurred after the time charged in the Indictment, involving property not listed in the Indictment, and buyers and corporations not listed in the Indictment. The properties were located on Camden Street and Mascotte Street. Mr. Slater testified that after the charged transactions were completed, he was present when Mr. Muscatell discussed with David and Virginia Ramos how rent subsidies work with regards to the Mascotte Street properties. (R. 8-306). The Ramos' never testified at the trial.

Mr. Slater also testified about his knowledge of Sonrisa Bay Corporation, and how that corporation relates to property transactions on the Mascotte Street properties. (R. 9-15). Mr. Slater testified to a transaction involving the Mascotte Street properties, to Mr. Bower's involvement as a trustee, and Mr. Muscatell's role as the realtor. (R. 9-16). Mr. Slater, explained that after the breakfast conversation with Mr. Steinberg at Wag's Restaurant, he was told by Mr. Muscatell that they needed to switch the corporation involved in the real estate transactions so it would look like there were more people involved in selling property in this manner, and that there was a larger market than there really was. (R. 9-17). Again, this conversation regarding Sonrisa Corporation occurred after the time of the Indictment.

Mr. Slater was asked about his dealings with Angel and Linda

Del Gato, Mr. Muscatell's in-laws, Valerie Jones and Carlos Lemes. Mr. Slater explained that all of these people were his clients. Mr. Slater went on to say that his real estate transactions with these people involved Mr. Muscatell as the real estate broker, Palladino Corporation as the seller, and that there were rebates and land flips involved in the transactions. (R. 9-150). Again, all of these transactions and individuals were not named in the Indictment.

Mr. Slater testified that Mr. Muscatell was involved in all of the eleven (11) transactions listed in his own plea agreement with the Government. (R. 9-153). In addition, Mr. Slater testified, over objection, that after the appraisals on the properties listed in the Indictment were completed, he was present for the breakfast at Wag's Restaurant with Mr. Steinberg. (R. 9-10). Mr. Slater testified that Mr. Muscatell attempted to persuade Mr. Steinberg that he should do the appraisals. (R. 9-11). However, Mr. Slater was not aware of Mr. Muscatell's offering Mr. Steinberg a note to do the appraisals, only that he was offered $500.00 per appraisal. (R. 9-120).

A property buyer, Valerie Jones, was a customer of Mr. Muscatell's prior to the time specified in the Indictment. (R. 10-33). The property involved in her real estate transactions was not the property specified in the Indictment. She had no involvement or relationship with the Ricos. Over objection, Ms. Jones testified to her purchase of three (3) properties on Camden Street in early 1988. (R. 10-42). These properties needed to be renovated. Ms. Jones testified that she informed Mr. Muscatell that she did not have the funds to renovate this property if she purchased the property. Mr. Muscatell informed her that he could show her some creative financing which would allow her to purchase the property and provide her with funds to make the necessary repairs. (R. 1042). As a result of her conversation with Mr. Muscatell, she formed a corporation, the Sonrisa Bay Corporation (R. 10-43). Ms. Jones testified that Mr. Muscatell informed her that she had to use Mr. Bower as trustee in Sonrisa Bay Corporation because they could not look like they were buying properties themselves. (R. 10-50).

Ms. Jones also testified that her loan applications on the Camden Street properties were inaccurate and untruthful because

the applications did not disclose her ownership of property on Cooperfield. Ms. Jones testified that she did not disclose these properties on her application because Mr. Muscatell had told her that her ownership of these properties had not shown up on her credit report, so she should not disclose them to the bank.

REASONS FOR GRANTING THE WRIT

I. The Trial Court admitted evidence under Rule 404(b) of other crimes, wrongs, or acts which were extrinsic in nature, of little to no probative value, and extremely prejudicial to the Defendants. The Eleventh Circuit erroneously determined that these acts were intrinsic in nature and were properly admitted as evidence of the same series of transactions as the charged transactions. In its opinion, after determining that the evidence complained of was intrinsic in nature, the Eleventh Circuit did an analysis of admissibility under Fed. Rule of Evid. 403. It determined that the potential prejudice of the challenged evidence was not substantially outweighed by its probative value. This Court's intervention is required for four reasons: 1) Because of the erroneous finding by the Eleventh Circuit that the evidence complained of was intrinsic and part of the same series of transactions. **(Intrinsic versus Extrinsic).** 2) The standard for balancing probative value versus unfair prejudice for evidence admitted under Fed. Rule of Evid. 404(b) is, or should be, less strict than the similarly worded balancing test applied under Fed. Rule of Evid. 403. **(Rule 404(b) balancing test versus Rule 403 balancing test).** 3) The Defendants were wrongly convicted based upon evidence of other acts which did not show intent, motive or plan on the part of the Defendants. **(Probative value versus prejudicial effect).** 4) The Court failed to demonstrate in their opinion an analysis of the issues presented that contemplated the cumulative, prejudicial effect of extrinsic act evidence, insufficient evidence and repeated prejudicial comments made by the Government in closing argument. **(Cumulative Effect).**

INTRINSIC EVIDENCE VERSUS EXTRINSIC

Extrinsic evidence is evidence which is not relevant to the crime charged. Extrinsic evidence is generally inadmissible in trial

against the accused. For the purposes of Rule 404(b), extrinsic evidence, or evidence of other crimes, wrongs or acts are not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Before determining whether evidence is admissible under Rule 404(b), it must first be determined whether the evidence of other criminal activity arose out of the same transaction or series of transactions as the charged offense, *United States v. Kloock*, 652 F.2d 492, 494 (5th Cir. 1981), if it was inextricably intertwined with the evidence regarding the charged offense, *United States v. Killian*, 639 F.2d. 206, 211 (5th Cir. 1981), *cert denied* 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed. 2d 394 (1982), or if it is necessary to complete the story of the crime of trial, *United States v. Wilson*, 578 F.2d 67, 72-73 (5th Cir. 1978). If the questioned evidence falls into any of these categories then the evidence is not considered to be extrinsic in nature and a 404(b) analysis is not required. *United States v. Weeks*, 716 F.2d 830 (llth Cir. 1983).

In the Eleventh Circuit's opinion in the case at bar, the Court determined that the bad act evidence complained of by the Defendants at trial, and in their Briefs on Appeal, was properly admissible as intrinsic evidence of the same series of transactions as the charged offenses. *U.S. v. Muscatell*, 42 F.3d 627, 630. The Court erroneously determined that the charged offenses were not isolated acts, but rather, were part of a series of transactions involving the same principal actors, in the same roles, employing the same modus operandi. The Court failed to recognize the entire basis of the Defendant's defense to this case as well as some factors inherent in the nature of the offenses alleged.

As to the defense in the case, the Defendants proved at trial that each individual aspect of the property transactions which were the subject of this trial were not, in and of themselves, illegal. The purchase by a trustee company and subsequent "land flips" were not illegal. Rebating a portion of a real estate commission to the buyer was not illegal. Offering a tenant an incentive to re-sign new rental leases at an increased rate is also perfectly legal. (R. 11-17, 6-146,

7-242). The Government essentially conceded these aspects of the case. With these points not contested, the essential issues in the case became whether the Defendants intended to defraud the lending institutions by using the method of purchase and finance employed in the subject transactions.

The property transactions were well documented, including the manner in which they were conducted. There were copies of both sets of contracts on the front and back end of the "land flip." The re-negotiated leases were on file with the addendums attached offering the incentive to sign the new lease. There were letters and contracts showing the real estate commission rebate. All of these things were shown by the Government and admitted by the Defense at trial. It was the Defense's contention that these aspects of the transactions were not illegal. There were some issues as to whether certain things, such as the addendums to the leases were presented to the appraisers or the lenders but those questions are not germane for the purpose of this argument. The entire case turned on whether the jury believed that Mr. Muscatell and Mr. Bower were involved in the aspects of the deals which involved presenting false information to the lenders on loan applications and whether they instructed others to falsify documents to make the borrowers appear credit worthy and have sufficient income to qualify for the loans for which they had applied. The final question became, did the Defendants devise and execute this scheme for lawful and honest purposes or were they knowingly and intentionally intending to deceive lending institutions of money. Because the entire case boiled down to this, the character of the Defendants received a focus more intense than that of a normal criminal trial.

The nature of the offenses charged and acts committed were such that they could be tied to a specific period in time. The allegations in the Indictment involved eight separate pieces of property in two groups of four. There were four quadraplex units located next to each other and consequatively addressed on 15th Street (hereinafter "the 15th Street properties"). There were also four quadraplex units located next to each other and consequatively addressed on 50th Street (hereinafter "the 50th Street properties"). The closing of the 50th Street properties all happened close in time together and were

essentially purchased at the same time. The same is true for the 15th Street properties. However, the 15th Street properties were not sold or closed at the same time as the 50th Street properties. The conspiracy count spanned from on or about August, 1989 to on or about September, 1989. This specific period of time included the dates of the closings of each of the eight quadraplex units. Each piece of property bought and sold had a separate contract, a separate legal description, separate lender and could be completely and totally severed from the other transactions. Although the transactions contained in the Indictment were handled in a similar manner with Brett Muscatell as the real estate broker, Lewis Bower as the Trustee for the front end purchase of the land flip and John and Doris Rico as the buyers on the back end of the transaction, each transaction is separate and distinct and did not arise out of the same transaction or series of transactions, is not inextricable intertwined with the others, and are not necessary to complete the story of the crime.

Even if the charged transactions could be considered the same *series* of transactions, although really two separate series of transactions, the extrinsic evidence complained of by the Appellant regarding property transactions which were outside the scope of the Indictment were not the same series of transactions. The specific testimony that was complained of by the Defendants and is the subject of this Petition is the testimony of Keith Slater regarding property transactions that he conducted with Mr. Muscatell as well as property transactions that Mr. Slater was the mortgage broker on and people other than John and Doris Rico were the buyers. The second category of extrinsic evidence complained of by Muscatell and Bower on Appeal was testimony from Valerie Jones regarding certain properties that she had purchased where Mr. Muscatell was the real estate broker, and he rebated a portion of his commission, and Mr. Bower acted as a trustee on the front end of the transaction. These property transactions involved properties located on Camden Street and were closed prior to the time period set out in the Indictment. Finally, the third category of evidence was extrinsic evidence testimony of Allen Steinberg regarding an alleged bribe offered to him by Mr. Muscatell for the purpose of Mr. Steinberg providing an appraisal for the Mascotte Street properties. The alleged bribe was described by Mr. Steinberg as possibly half of a

$20,000.00 note. He admittedly had only a vague recollection of the incident. (R. 8-95)

The testimony of Keith Slater, Valerie Jones, and Allen Steinberg, regarding property transactions not contained in the Indictment, were separate and distinct transactions and were introduced for the sole purpose of poisoning Mr. Muscatell's and Mr. Bower's character in front of the jury. This was especially the case with regard to the alleged bribe offer by Mr. Steinberg.

The testimony on the extrinsic transactions complained of involved properties not alleged or set out in the Indictment, a different entity was the purchaser on the front end of the transaction in some circumstances and different people were the purchasers on the back end of the transaction in all circumstances. These transactions occurred outside the scope of time set out by the Government in the Indictment, and all of the transactions can be specifically identified and tied to a specific point in time as to when that transaction took place. Based on the foregoing facts, the complained of evidence could not be considered the same transactions or series of transactions. There is no question that the bad act evidence was not inextricably intertwined with the charged transactions. The existence of each and every transaction could have been proved separately by the Government. Additionally, there is no issue of necessity to complete the story of the crime. Each transaction is a complete story itself and is not required to be told along with the others. Certainly, the 15th Street properties are logically tied to each other, as are the 50th Street properties. However, tying the 15th with the 50th, and either of these with the complained of evidence of the extrinsic transactions not contained in the Indictment, is a leap that cannot be taken. For these reasons, the Petitioners strongly believe that the complained of testimony, should not have been admitted against the Defendants and was done so for the sole purpose of attempting to assassinate the character of Mr. Muscatell and drag Mr. Bower down with him. The evidence was extrinsic in nature and, if admissible at all, it would have been so only under Rule 404(b). The nature of a property transaction and the ability to tie it to a certain period of time does not lend itself to be dependant or intertwined with other transactions. The analysis of whether the evidence

should have been admitted under Rule 404(b) is contained in the following sections of this Petition.

RULE 404(b) BALANCING TEST VERSUS RULE 403 BALANCING TEST

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. Fed. Rule of Evid. 404(b).

In order for evidence of other crimes, wrongs or acts (extrinsic act evidence) to be admissible in a trial against a defendant, it must meet the requirements of the Rule 404(b) as set out above. The purpose of this Rule is to protect an accused from being wrongly convicted on evidence not relevant to the crime with which he is being charged. A jury may believe that the accused committed the crime for which he is charged not because of the evidence presented on the case for which he is standing trial but because they believe that if he did the extrinsic acts then he may have acted in conformity therewith related to the charged crime. This, of course, unfairly prejudices an accused and would be violative of his Constitutional rights.

Rule 404(b) sets out specific situations where extrinsic act evidence is admissible. It is admissible to prove motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident. The evidence is admissible, but can only be considered, for the purpose to which it is offered. Trial Courts regularly caution jurors regarding the purpose for which 404(b) evidence may be considered.

Federal Rule of Evidence 403 states as follows:

> Although relevant, evidence may be excluded if its

> probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

"Unfair Prejudice," within the meaning of this Rule, means an undue tendency to suggest decision on an improper basis. Exclusions of relevant evidence for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. *(See* Notes of Advisory Committee on 1972 Proposed Rules, Fed. Rule of Evid. 403).

In determining whether evidence of other crimes, wrongs or acts are admissible under Rule 404(b), the Fifth Circuit set out a test in the case of *United States v. Beechum*, 582 F.2d 898 (5th Cir.) (en banc), *cert. denied*, 440 U.S. 920, 99 S. Ct. 1244, 59 L.Ed. 472 (1979). The Rule (404(b)), according to the Beechum Court, calls for a two step process. First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403. Id. at 911. *Beechum* states that the Rule calls for such a two step analysis based upon the Advisory committee notes contained within the Rule. Id. at 911 foot note 14:

> The Advisory Committee Notes to Rule 404(b) indicate that this is the analysis contemplated by the Rule:
>
> No mechanical solution [to the issue of admissibility of extrinsic offense evidence] is offered. The determination must be made whether the danger of undue prejudice *outweighs* the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403. (Emphasis added).
>
> 28 U.S.C.A. Rules of Evidence at 109 (1975).
>
> The Advisory Committee Note's directive is reinforced by the Senate Committee Report, which states,

> "with respect to permissible uses for [extrinsic offense] evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion, waste of time." S.Rep. No 93-1277, 93rd Cong., 2d Sess. 24-25 (emphasis added),...

In addition to setting out a two part test to determine the admissibility of extrinsic offense evidence, *Beechum* recognizes that evidence of other crimes is inherently prejudicial. It goes on to state that, where extrinsic offense evidence is relevant to an issue such as intent, it may well be that the evidence has force that is not substantially outweighed by its inherent prejudice. *Id.* at 910.

Although *Beechum* appears to be clear regarding the balancing test to be applied in weighing probative value versus prejudicial effect, there are certain factors in *Beechum,* the Advisory Committee in the Rule, and in the Legislative intent, which indicate that the balancing test to be used for weighing whether the probative value is substantially outweighed by the prejudicial effect is the same standard as that set out in Rule 403 or if it is a less stringent standard.

Any and all evidence or testimony which is offered at trial is subject to Rule 403, Federal Rules of Evidence. A Judge has discretion to determine if evidence has probative value which is substantially outweighed by its prejudicial effect. The Court can exclude evidence under Rule 403 if it feels that the probative value of the evidence is substantially outweighed by unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Evidence does not have to be extrinsic in nature to be excluded under Rule 403.

The Petitioners contend that the test for balancing whether probative value is substantially outweighed by unfair prejudice under Rule 404(b) is, or should be, a standard which is less stringent than the standard set out in Rule 403 for all evidence. The standard under Rule 404(b) should favor excluding evidence where unfair prejudice *outweighs* the probative value of the evidence. The reason for this is recognized in *Beechum* but not applied by the Court.

Beechum states that evidence of extrinsic offenses are inherently prejudicial. *Id.* at 910. If evidence is inherently prejudicial, it only makes sense that this type of evidence should be more carefully considered before it is permitted to be entered into evidence. Inherently prejudicial evidence should not be judged by the same standard as evidence which is directly relevant to a case and which does not carry inherent prejudices against one side.

The *Beechum* decision references legislative history in its footnotes to the case. The Court seems to draw inferences from the history which go beyond what is being said. Footnote 13 at 910, discusses how the Court believes Congress intended to put greater emphasis on the admission of extrinsic offense evidence than the old Supreme Court version of the Rule because of the change in the second sentence so that instead of stating that the Rule does not forbid admission to saying that the Rule allows admission. The Court's reasoning is misplaced or overemphasized. The Rule was much more easily understood coming from the affirmative as modified. This was consistent with the change to Rule 402 which established a presumption that relevant evidence is admissible.

The Court, in *Beechum*, goes further and cites the Senate's Committee Report at footnote 13, p. 911, and interprets that to mean that the Senate intended to limit a Judges power in excluding extrinsic offense evidence unless it met the criteria of Rule 403. Although, the Senate cites Rule 403 in its excerpt, it does not reference whether the standard should be that the probative value has to be "outweighed" or "substantially outweighed" by the unfair prejudice. They simply cite the reasons for excluding evidence in general under Rule 403, "i.e. prejudice, confusion or waste of time."

In footnote 14, at 911, the Advisory Committee Note specifically states there is no mechanical solution, and then states, "the determination must be made whether the danger of undue prejudice *outweighs* the probative value of the evidence..." (Emphasis added). The Advisory Note specifically leaves out the word "substantially" when discussing weighing the probative value versus unfair prejudice. The Note goes on to reference Rule 403 generally about considering factors normally considered in making such a

determination under Rule 403.

The above referenced section specifically sets the test and excludes the word "substantially" when talking about a 404(b) balancing test. It then adds that all other considerations made under a Rule 403 analysis should also be considered. This is not referencing the standard of "outweigh" versus "substantially outweigh," but only the other considerations in Rule 403.

Finally, at the end of footnote 14, the Court believes it found support to its interpretation of the Advisory Committee Notes by citing a Senate report which states, "with respect to permissible uses for [Extrinsic offense] evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion, or waste of time." S.Rep. No. 93-1277, 93rd Cong., 2d Sess. 24-25. Again, the Senate report does not indicate it's intent regarding the standard of the test that should be applied in balancing the probative value versus the unfair prejudice. It does indicate that it only wants evidence excluded for some of the reasons set out in Rule 403, prejudice, confusion or waste of time.

The test for admitting extrinsic offense evidence under Rule 404(b) should be to determine if the evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value which is not *outweighed* by its undue prejudice and must meet the other requirements of Rule 403. This test recognizes the inherent prejudice in extrinsic offense evidence and more carefully and fairly weighs it against "undue prejudice." Undue prejudice is in quotations because it recognizes that almost all extrinsic offense evidence will be prejudicial. However, only if the "undue prejudice" outweighs the probative value should the evidence be excluded. This modified test, which is more consistent with the intent of the legislature as well as the Advisory Committee, allows for the government to use evidence of extrinsic offenses when it is relevant to an issue in the case set out in Rule 404(b) and when the probative value of the evidence does not outweigh its undue prejudice to the Defendant.

The *Beechum* decision also supports the above interpretation

and test in that the Court specifically states that it is a *two* step test. If the second step of the test is to simply apply the standard set out in Rule 403, which all evidence is subjected to, that would not be a true "two step test." If that were the case, every test for the admissibility of evidence that is set out in the law needs an additional step added because all evidence is subject to being excluded under Rule 403. If the *Beechum* Court, the legislature and the Advisory Committee had intended the same test as in Rule 403 to apply as the balancing test in Rule 404(b), they would not have stated that this was a "two step" test but would have simply set out the first step and mentioned that, as with all evidence, if the probative value is substantially outweighed by the undue prejudice, then the evidence should be excluded under Rule 403.

The intent of the Court in the *Beechum* decision is clear. They wanted Rule 404(b) evidence to be subjected only to the standard set out in Rule 403, after meeting the threshold of the initial requirements of Rule 404(b). However, a careful look at *Beechum* calls for a different interpretation than that suggested in the plain language of the case. The Court misconstrues the intent of the legislature and promulgates a test which fails to recognize the inherent prejudices in dealing with extrinsic offense evidence that the Court speaks of in the same opinion. Additionally, the test, as set out in the plain language of *Beechum*, fails to address the concerns of a criminally accused to be tried and convicted on evidence of the crime charged. The government should not be permitted to turn to 404(b) evidence simply because they cannot prove their case otherwise. The evidence should only be admitted when it goes to prove one of the limited circumstances set out in Rule 404(b).

PROBATIVE VALUE VERSUS PREJUDICIAL EFFECT

There were three main portions of testimony regarding bad acts which were not part of the crime charged that the Petitioners complained of at trial and on appeal. They were: i) the testimony of Keith Slater regarding property transactions he was involved in with Mr. Muscatell and others which were not the property transactions alleged in the Indictment and were not within the time period set out

in the indictment and had no relevance to the charges for which Mr. Muscatell and Mr. Bower were being tried; ii) The testimony of Valerie Jones regarding her purchase of three properties on Camden Street in early 1988 and her formation and use of Sonrisa Bay Corporation; iii) The testimony of Allen Steinberg regarding an attempted bribe by Mr. Muscatell to prepare appraisals for the Mascotte Street properties. This was after the time period contained in the Indictment.

For i) and ii) above, the evidence was extrinsic in nature. It was evidence of other property transactions which were not contained in the Indictment. It involved buyers other than John and Doris Rico. It involved properties which were not contained in the Indictment. In fact, these transactions were listed by the government in its "Notice of Intent to Introduce Evidence" provided to Counsel for the Defendants the day before trial began.

These extrinsic transactions did not pass the first step of Rule 404(b) in that they were not relevant to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The government claimed that the evidence was admissible to show intent to defraud on the part of the Defendants and that just happened to be the main argument the defense was making at trial. The problem with the government's theory to show intent through the extrinsic act evidence was that the evidence was simply more of the same evidence which the government was presenting at trial. No criminal intent could be proven by showing that Mr. Muscatell did other property transactions in a similar manner in which he was involved in the charged transactions. The government could have shown one million of these transactions but would have been no closer to proving criminal intent.

Based on the fact that the evidence of other property transactions employing the same techniques of no money down, conducting a "land flip," rebating a portion of the real estate commission and renegotiating the rental leases is more of the same which was established regarding the charged offenses, the probative value of this evidence is severally diminished. The prejudicial effect, on the other hand is extreme. The government was parading more witnesses in

front of the jury telling of more transactions that Mr. Muscatell was involved in making more money on real estate commissions and costing more banks money when the properties were foreclosed on. This was an effort by the government to assassinate the character of the Defendants. This purpose is specifically prohibited by Rule 404(b), the exact Rule under which the evidence was admitted.

The most severally damaging testimony against Mr. Muscatell and indirectly against Mr. Bower came from Mr. Steinberg regarding the alleged bribe. This evidence is different in that, if true, it would certainly go to a relevant issue of the case for which the Defendants were on trial. It would establish that Mr. Muscatell and Mr. Bower had criminal intent to defraud by attempting to bribe an appraiser to give an appraisal for a price which the property did not support in order to obtain a loan which the property would not sufficiently collateralize. The problem with the admission of Steinberg's testimony on the alleged bribe is that his recollection of the event is very vague. Mr. Steinberg's testimony was that Mr. Muscatell offered him some portion of a note as a type of bribe to do the Masscotte Street properties appraisals. He testified that he seemed to remember something about a half of a $20,000.00 Note but could not remember the specifics. (R8-95).

The other person who was at this meeting at Wag's restaurant, where this supposed bribe occurred, was Keith Slater. He was the star witness for the prosecution and he had received a reduced sentence for his involvement in the case. Mr. Slater, who was required to tell the truth or have his plea agreement with the government voided, testified that he did not recall anything about a bribe or note offered to Mr. Steinberg to perform appraisals on the Masscotte Street properties. Mr. Muscatell, who took the stand on his own behalf denied that any such bribe offer existed.

This testimony was highly inflammatory and was objected to by the defense at trial. This was the only testimony by a witness who was not testifying pursuant to a plea agreement with the government who directly attributed an illegal act to Mr. Muscatell. Mr. Steinberg could not remember the details of the so-called bribe offer, but only a vague reference to Wag's restaurant and one-half of a note. The

other cooperating government witness, Mr. Slater testified that he was present at that meeting and he does not recall such a bribe offer being made. In addition to all of this, the testimony was out of the time period of the conspiracy contained in the Indictment and it was regarding properties which were not contained in the Indictment. For the following reasons, the probative value of that evidence is minimal and the risk of undue prejudice is tremendous. If the Court applied the balancing test argued by the Petitioner's in this Petition of weighing extrinsic offense evidence, the probative value is outweighed by the prejudicial effect. However, even if the Court were to disagree with the Petitioner regarding the balancing test, the Eleventh Circuit and the Trial Court erred in allowing this testimony to come against Mr. Muscatell and Mr. Bower because it does not pass the more stringent balancing test set out in Rule 403. The scant probative value of that evidence is substantially outweighed by its risk of undue prejudice. The testimony should have been excluded and was offered for the sole purpose of assassinating the character of Mr. Muscatell, the essential issue in the case.

CUMULATIVE EFFECT

The Court discussed extrinsic act evidence, was troubled by statements made by experienced prosecutors during closing argument and rebuttal closing argument, and, rendered a brief contemplation of the sufficiency of the evidence. The Court did not, however, include in its analysis a consideration of the cumulative prejudicial effect 1) of the admission of acts other that those included in the indictment, 2) the minimal testimony and evidence adduced at trial concerning Mr. Bower and the insufficiency of evidence against Mr. Bower and Mr. Muscatell, and 3) the repeated comments by the prosecutors during closing arguments that concerned Mr. Bower's decision not to testify or put on a defense. The accepted and usual course of appellate review requires consideration of the cumulative prejudicial effect of multiple issues. This is especially so in the instant case in which an individual issue was determined to be "potentially troubling."

The snowball effect of prejudice in this case should have been contemplated by the Court and reported to insure a fair and just appeal.

CONCLUSION

For all of the above and foregoing reasons, the joint Petitioners respectfully request this Court to grant the joint Petition for Writ of Certiorari, to require briefs on the merits and oral argument of this cause and to continue the stay of the Issuance of the Mandate pending resolution of these issues by this Honorable Court.

Respectfully submitted,

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U.S. v. MUSCATELL

UNITED STATES of America,
Plaintiff - Appellee

v.

Brett MUSCATELL, Lewis H. Bower, Jr.,
Defendants - Appellants,

No. 93-3194

United States Court of Appeals,
Eleventh Circuit.

Jan. 18, 1995

Defendants were convicted on multiple counts of conspiracy, fraud and money-laundering, in connection with a "land flip" scheme, in the United States District of Florida, No. 92-225-CR-T-99A, Samuel P. King, J. Defendants appealed. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, sitting by designation, held that: (1) evidence of other "land flip" schemes in which defendants had allegedly been involved was intrinsic to charged activities, and not subject to evidence rule restrictions governing extrinsic other crimes evidence; (2) probative value of evidence was not outweighed by its potential prejudice; and (3) prosecutorial comments did not require mistrial.

Affirmed.

1. Criminal Law ~ 1153(1)

Determinations regarding admissibility of evidence rest largely with sound discretion of trial court and will not be disturbed on appeal absent clear showing of abuse of discretion.

2. Criminal Law ~ 369.2(2)

Evidence of criminal activity other than charged offense is not "extrinsic evidence," for purposes of evidence rule allowing admissibility of other crimes evidence, if it concerns an uncharged offense that arose out of same transaction or series of transactions as charged offense. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

See publication *Words and Phrases* for other judicial constructions and definitions.

3. Criminal Law ~ 369.2(3.1)

Evidence that defendants had operated "land flip" scheme on ten prior occasions was intrinsic evidence not subject to limitations imposed by evidence rule covering admission of extrinsic other crimes evidence; charged and uncharged offenses involved purchases of quadriplex residential rental property through corporation owned by conspirator, resale at inflated prices through second conspirator acting as real estate broker and third conspirator acting as mortgage broker, large nondisclosed buyer rebates, fraudulent loan application, undisclosed rent subsidies, and artificially inflated appraisals and sales commissions, with only variables being location of rental properties. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

4. Criminal Law ~ 371(1)

Evidence that defendants charged with having perpetrated "land flip" scheme, under which value of real property was artificially increased so as to allow them to obtain loans in amounts in excess of sums otherwise available from lenders, had participated in similar schemes before and after engaging in charged activities had probative value which was not substantially outweighed by danger of prejudice; defendants had argued lack of intent, which was refuted by evidence of similar activity. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

5. Criminal Law ~ 721(3)

Standard for determining whether prosecutor has impermissibly commented on defendant's privilege against self-incrimination is whether statement was manifestly intended to be, or was of such character that jury would naturally and necessarily take it to be, comment on failure of accused to testify. U.S.C.A Const.Amend. 5.

6. Criminal Law ~ 1154

Court of Appeals reviews district court's denial of motion for mistrial, based upon allegations that prosecutor has impermissibly commented on defendant's privilege against self-incrimination, for abuse of discretion. U.S.C.A. Const.Amend. 5.

7. Criminal Law ~ 721(3)

Prosecutor did not impermissibly comment on exercise of self-incrimination rights by defendant charged with participating in scheme to artificially inflate price of real property, so as to obtain larger loan commitments from lenders, when he stated that jury could not know whether or not defendant had seen false loan applications; when viewed in context, statement referred to law of conspiracy and jury's ability to hold defendant vicariously liable for

acts of his coconspirators. U.S.C.A. Const. Amend. 5.

8. Criminal Law ~ 729

Prosecutor's reference, during rebuttal, to what defense had not proven and what defense could not prove, did not constitute an impermissible reference to defendant's failure to testify; following an interruption from court, prosecutor retracted statement, reiterated fact that burden of proof remained with government, and explained that he had merely intended to tear holes in defense's arguments. U.S.C.A. Const. Amend. 5.

Appeals from the United States District Court for the Middle District of Florida.

Before KRAVITCH and DUBINA, Circuit Judges, and GIBSON[1], Senior Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge:

Brett Muscatell and Lewis Bower appeal their convictions for multiple counts of conspiracy, fraud, and money-laundering in connection with a land flip scheme. We AFFIRM.

I. BACKGROUND

In the fall of 1988, Muscatell, a Tampa real estate broker, agreed to sell two separate groups of adjacent quadriplex rental unites to John Rico, a self-employed maintenance worker. Rico needed financing in order to purchase the quadriplex units. Local lenders, however, required a down payment of ten to thirty percent of the purchase price before financing such a purchase and limited commercial mortgages to eighty percent of the lesser of either the appraised value of the property or its purchase price.

In order to obtain financing, Rico, Muscatell, Bower, a C.P.A., and John Slater, a local mortgage broker, engaged in a land flip scheme to artificially boost the real estate values and thereby increase the amount of financing available. Muscatell and Bower agreed for Bower's corporation, Palladino, to purchase the

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1. Honorable Floyd R. Gibson, Senior US Circuit Judge for the Eighth Circuit, sitting by designation.

quadriplex units from the original owners. Palladino then resold them at a substantial markup to Rico through Muscatell, who acted as the real estate broker. As president of Palladino, Bower purchased each of the first four rental units (the North 15th properties) for $90,000.00 per unit and resold them to Rico for $160,000.00 per unit. Palladino purchased the second group of quadriplex units (the North 50th properties) for $85,000.00 each, and resold them to Rico for $163,00.00 each.

As a means of boosting the units' appraisal value to match the inflated purchase prices, Muscatell attempted to inflate the units' rental values by renegotiating new leases in which Palladino would pay tenants cash bonuses in order to offset large rental increases. These bonuses were not disclosed to the appraisers. Muscatell and Slater unsuccessfully offered several appraisers $500 per unit, double the going rate, as compensation in exchange for favorable appraisals. Muscatell also attempted to purchase additional documentary stamps on each sale of the second quadriplex units in order to make it appear to subsequent appraisers that Palladino had paid more for the property than it actually had.

In order to qualify Rico for financing, Muscatell instructed Slater to generate falsified income documentation for each purchase. This false income information was submitted on all eight loan applications, which were made to separate federally insured financial institutions in an attempt to conceal Rico's true income to debt ratio. The applications failed to disclose the fact that Rico was attempting to purchase additional rental units. Each application was submitted, pursuant to Muscatell's instructions, close enough in time to the others so that none of the lenders would learn of the other pending applications.

Muscatell, Bower, Slater, and Rico employed a complex buyer rebate scheme as a means of circumventing the down payment requirement. Rather than disclosing the true source of Rico's down payment income, Rico, Muscatell, and Bower generated false documentation in order to create the illusion that Rico was funding his own down payment. After Rico received the required financing, he forwarded the funds to Bower. Bower's corporation, Palladino, then used these funds to pay the original owners of the rental units, to finance the rental subsidies, and to pay the remainder of Muscatell's commission. Muscatell's commission rates were over twenty-five percent of the inflated total sale price, well in excess of the standard commission rates of five to ten percent for these types of transactions. In total, Rico was able to borrow $1,001,000.00 to purchase eight quadriplex units from Palladino. Muscatell received total real

estate commission of $153,000.00 above the amount rebated to Rico. Rico eventually defaulted on his mortgage payments, and the lenders foreclosed on the properties.

Muscatell and Bower were tried in federal district court under an eleven-count indictment. The government's witnesses included Allen Steinberg, a residential real estate appraiser who appraised the North 50th properties, and Valerie Jones, a former real estate purchaser involved with Muscatell and Bower in similar transactions. Slater and Rico also testified against Muscatell and Bower pursuant to plea agreements.

Steinberg's testimony related to the appraisal of another Tampa quadriplex that took place after the transactions charged in the indictment. Steinberg testified that sometime after he had completed his appraisals of the North 50th properties, Slater offered to hire him to appraise another quadriplex. Steinberg testified that he refused this second appraisal when his subsequent research revealed that comparable properties did not support the value suggested by Slater. Steinberg also testified that during the course of a May 1989 meeting with Slater and Muscatell, Muscatell offered Steinberg half of a $20,000 note in exchange for favorable appraisals on the aforementioned quadriplex properties.

Valerie Jones testified that in mid-1988, prior to the charged transactions, she had purchased several quadriplex units through a similar land flip scheme involving Bower, Muscatell, and Slater. Jones testified that she had formed a corporation, Sonrisa Bay Corporation, at the direction of and under the control of Bower in order to avoid the appearance that they were buying property from themselves. Jones also confessed to submitting fraudulent loan applications at the direction of Muscatell, who had instructed her not to list all of her rental properties on her loan application.

John Slater testified that he had represented other buyers in similar rebate schemes and land flip transactions both prior and subsequent to the charged transactions. In each transaction, Bower acted as the president of the flip corporation, either Palladino or Sonrisa Bay, and Muscatell acted as the real estate broker. In total, Slater testified that he and Muscatell had been involved in eleven similar rebate and land flip transactions for which Muscatell had not been indicted.

Slater also testified to several incriminating conversations that took place either before or after the charged transactions. Those

conversations include a discussion in which Muscatell explained the necessity of not disclosing the rebates to the lending institutions because the rebate would be considered a reduction in the sale price. Slater testified about a conversation that took place after the meeting with Steinberg. In that discussion, Muscatell stated that a new "flip corporation" was needed to create the impression that more people were involved in the transactions because Steinberg had figured out that they were "creating [their] own market for multi-family [rental units]." Slater also testified as to a conversation that took place between Muscatell and other prospective purchasers in which Muscatell explained the use of rent subsidies to artificially boost appraisal values.

The jury convicted Bower of conspiracy to commit bank fraud, conspiracy to commit wire fraud, and conspiracy to make false and fraudulent statements in matters within the jurisdiction of a federal agency, in violation of 18 U.S.C. § 371 (1988); wire fraud, in violation of 18 U.S.C. § 1343; three counts of bank fraud, in violation of 18 U.S.C. § 1344; two counts of making false and fraudulent statements in matters within the jurisdiction of a federal agency, in violation of 18 U.S.C. § 1001; and two counts of money-laundering, in violation of 18 U.S.C. § 1957. Muscatell was convicted on the same counts, plus an additional count for making false and fraudulent statements in matters within the jurisdiction of a federal agency. The district court sentenced Muscatell and Bower to thirty-six and twenty-four months imprisonment, respectively. Each was ordered to pay $680,827 in restitution. This appeal follows.

II. DISCUSSION

1. Extrinsic Acts Evidence

The day before trial, the government notified the defendants in writing of its intent to introduce evidence pursuant to Fed.R.Evid. 404(b).[2] Muscatell and Bower claim that the district court abused its discretion by improperly admitting extrinsic bad act evidence

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2. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Fed.R.Evid 404(b)

against them in violation of 404(b). Specifically, they challenge the testimony of Steinberg, Jones, and Slater.

[1, 2] Determinations regarding the admissibility of evidence rest largely with the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of abuse of discretion. *United States v. Cardenas*, 895 F.2d 1338, 1342-43 (11th Cir. 1990). The preliminary issue is whether the evidence in question is actually extrinsic evidence and therefore subject to 404(b) analysis. Evidence of criminal activity other than the charged offense is not extrinsic within the meaning of Rule 404(b) if it is an uncharged offense that arose out of the same transaction or series of transactions as the charged offense. *United States v. Weeks*, 716 F.2d 830, 832 (11th Cir. 1983).

[3] We believe that the challenged testimony was properly admissible as intrinsic evidence of the same series of transactions as the charged offenses. The charged offenses were not isolated acts, but rather, were part of a series of transactions involving the same principal actors, in the same roles, employing the same modus operandi. Each transaction involved the purchase of quadriplex residential rental property through a Bower-headed flip corporation, resale at inflated prices through Muscatell acting as the real estate broker and Slater acting as the mortgage broker, large nondisclosed buyer rebates, fraudulent loan applications, undisclosed rent subsidies, artificially inflated appraisals, and inflated sales commissions paid to Muscatell. The only variables seem to have been the location of the rental quadriplexes, the identity of the buyers, and the switch from Palladino to Sonrisa Bay as the flip corporation.

Muscatell and Bower argue that the challenged evidence is necessarily extrinsic because it occurred either prior to or subsequent to the charged offenses. We find the Fifth Circuit's decision in *United States v. Dula*, 989 F.2d 772 (5th Cir.), *cert. denied*, — U.S. —, 114 S.Ct. 172, 126 L.Ed.2d 131 (1993), instructive. In *Dula*, the founder and the president of a corporation that supplied aerospace engineering materials were each indicted on charges of wire fraud, mail fraud, and false statements as part of an ongoing scheme to defraud their customers by substituting inferior products that failed to meet buyer specifications. The defendants objected to the testimony of a former employee regarding a prior uncharged transaction in which the corporation unsuccessfully attempted to pass nonconforming, inferior goods onto a buyer. *Id.* at 777. The court determined that the prior uncharged transaction was intrinsic evidence arising out of the same series of transactions as the charged offense.

> The defendants were charged with conducting a continuing scheme to defraud, characterized by the substitution of products, and it was necessary for the government to prove that the defendants had intentionally devised a scheme and artifice to defraud. In developing proof of intent and motive, the prosecution may offer all of the surrounding circumstances that were relevant.

Id.

In this case, Muscatell and Bower were charged with conducting a continuing scheme to defraud, characterized by land flip transactions, inflated appraisals, buyer-rebates, and fraudulent loan applications. Here, it was necessary for the government to prove that the defendants intentionally devised a scheme and artifice to defraud. "[O]ther transactions connected with the offenses charged have long been used to show a general pattern, the necessary criminal intent, or the guilty knowledge of the defendant." *Id.* Consequently, we concluded that the challenged testimony was intrinsic to the crimes charged. *See United States v. Montes-Cardenas,* 746 F.2d 771 (11th Cir. 1984) (the importation of cocaine was intrinsic as part of the same series of transactions as the charged offense of conspiracy to distribute cocaine).

[4] We also reject Bower's and Muscatell's argument that the district court abused its discretion by failing to exclude the testimony of Steinberg, Jones, and Slater under Fed.R.Evid. 403[3]. The factors determining this analysis include "the strength of the government's case on the issue of intent, the overall similarity of the extrinsic and charged offense, the amount of time separating the extrinsic and charged offenses and whether it appeared at the commencement of trial that the defendant would contest the issue of intent." *United States v. Dorsey,* 819 F.2d 1055, 1061 (11th Cir. 1987), cert. denied, 486 U.S. 1025, 108 S.Ct. 2002, 100 L.Ed.2d 233 (1988). In this case, these factors favor admission of the challenged testimony. The element of criminal intent was arguably the weakest link in the government's case, and the focus of the defense. The extrinsic acts were extremely similar to the charged offenses. The amount of time separating the extrinsic and intrinsic acts was minimal, the extrinsic

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3. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or nbeedless presentation of cumulative evidence." Fed.R.Evid. 403.

acts occurring mere months before and subsequent to the charged activity. Finally, both Muscatell and Bower made lack of criminal intent their primary defense from the outset of the trial. In sum, we do not believe that the potential prejudice of the challenged evidence substantially outweighed its probative value. We find no abuse of discretion under Fed.R.Evid, 403.

2. Prosecutorial Comments

[5, 6] Muscatell and Bower argue that the district court erred by failing to grant their motion for a mistrial based on allegedly improper prosecutorial comments on Bower's exercise of his fifth amendment privilege against self-incrimination.[4] The fifth amendment prohibits a prosecutor from commenting directly or indirectly on a defendant's failure to testify. *Griffin v. California,* 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1965). The standard for determining whether a prosecutor has impermissibly commented on a defendant's privilege against self-incrimination is "whether the statement was manifestly intended or was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States v. Garcia,* 13 F.3d 1464, 1474 (11th Cir.), *cert, denied,* — U.S. —, 114 S.Ct. 2723, 129 L.Ed.2d 847 (1994). The defendant bears the burden of establishing the existence of one of the two criteria. *Id.* We apply this test by examining the statements in their context in order to evaluate the prosecutor's motive behind the statements and in order to discern the impact of the statements. *Id.* The individual responsible for answering this question in the first instance is the trial judge, the only person who has the opportunity to observe the prosecutor's demeanor firsthand. *United States v. Watson,* 866 F.2d 381, 386 (11th Cir. 1989). Consequently, we review the district court's denial of the motion for mistrial for abuse of discretion. *Id.*

We find no abuse of discretion. Viewed in the context in which they were made, we find that none of these statements improperly commented on the Bower's exercise of his fifth amendment privilege against self-incrimination.

[7] Two of the challenged statements are potentially troubling. The first challenged statement came toward the end of the government's closing argument when the prosecutor state that the jury

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4. "No person...shall be compelled in any criminal case to be a witness against himself..." U.S. Const. Amend. V.

could not know whether or not Bower actually saw any false loan applications. Bower maintains that this statement referred to his failure to testify. The statement, when viewed in context, however, apparently refers to the law of conspiracy and the jury's ability to hold Bower vicariously liable for the acts of his co-conspirators. There is no reason why the jury would naturally interpret it as anything else.

[8] The second allegedly improper comment occurred during the government's rebuttal, in which the prosecutor referred to what the defense had not proven and what the defense could not prove. Following an interruption from the court, the prosecutor retracted this statement, reiterated the fact that the burden of proof remained with the government, and explained that he had merely intended to tear holes in the defense's arguments. We believe that the prosecutor's subsequent explanation adequately clarified his statement as a reference to the defense's failure to counter evidence produced by the government as opposed to comments on the defendant's failure to testify. It is well-settled that such comments do not run afoul of the fifth amendment. Watson, 866 F.2d at 386.

The final two challenged statements are less egregious, and similarly cannot be reasonably viewed as comments on Bower's decision not to testify. Because we conclude that none of the challenged statements improperly referenced Bower's exercise of his privilege against self-incrimination, we conclude that the district court did not abuse its discretion by denying Bower's motion for mistrial.

3. Sufficiency of the Evidence

We review Bower's sufficiency of the evidence claim de novo as a question of law. *United States v. Hooshman*, 931 F.2d 725, 733 (11th Cir. 1991). The question is whether the evidence, viewed in the light most favorable to the government, was sufficient to establish the defendant's guilt beyond a reasonable doubt. *Id.* We note that the evidence need not be wholly inconsistent with every reasonable hypothesis other than guilt. *Id.* We have reviewed the record and conclude that the government produced sufficient evidence to convict Bower on each count beyond a reasonable doubt.

III. CONCLUSION

For the foregoing reasons, the judgement of the district court is AFFIRMED.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 16, 1995
MIGUEL J. CORTEZ
CLERK

In The United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

NO. 93-3194

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

versus

BRETT MUSCATELL,
LEWIS H. BOWER, JR.,

Defendants-Appellants

Appeal from the United States District Court for the
Middle District of Florida

ORDER:

( ) The motion of BRETT MUSCATELL and LEWIS H. BOWER, JR. for ( ) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of BRETT MUSCATELL and LEWIS H. BOWER, JR. for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including MAY 15, 1995, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of BRETT MUSCATELL and LEWIS H. BOWER, JR. for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of BRETT MUSCATELL and LEWIS H. BOWER, JR. for a further stay of the issuance of the mandate is DENIED.

Phillis Kravitch
UNITED STATES CIRCUIT JUDGE

C-1

In The United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

NO. 93-3194

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 27, 1995
MIGUEL J. CORTEZ
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

versus

BRETT MUSCATELL,
LEWIS H. BOWER, JR.,

Defendants-Appellants

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION FOR REHEARING

BEFORE: KRAVITCH and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

PER CURIAM:

The petition for rehearing filed by appellant BRETT C. MUSCATELL, is *denied*.

ENTERED FOR THE COURT:

Phillis Kravitch

UNITED STATES CIRCUIT JUDGE

C-2

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 27, 1995
MIGUEL J. CORTEZ
CLERK

In The United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

NO. 93-3194

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

versus

BRETT MUSCATELL,
LEWIS H. BOWER, JR.,

Defendants-Appellants

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION FOR REHEARING

BEFORE: KRAVITCH and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

PER CURIAM:

The petition for rehearing filed by appellant LEWIS H. BOWER, is *denied*.

ENTERED FOR THE COURT:

Phillis Kravitch
UNITED STATES CIRCUIT JUDGE

*Honorable Floyd R. Gibson, Senior U.S. Curcuit Judge for the Eighth Circuit, sitting by designation.